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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1999

VASILIOS A. KARAGOUNIS, M.D., Ph.D.

PETITIONER,

vs.

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO; UNIVERSITY HOSPITAL

RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED

Are governmental subdivisions excluded from joint liability under Title VII?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 5th 1999.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 23rd 1999 and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 42 U.S.C. § 2000e(a)(b)

STATEMENT OF THE COURSE OF PROCEEDINGS

Petitioner filed suit on June 28, 1995 under Title VII of the Civil Rights Act of 1964 alleging discrimination and violations of the Act by the defendants the University of Texas Health Science Center at San Antonio ("UTHSC-SA") and the Bexar County Hospital District d/b/a the University Hospital ("District"). The District moved for summary judgment on May 10, 1996, which motion was referred along with other pre-trial matters to a Magistrate. The Magistrate recommended denial of the District's motion for summary judgment. However, the Court rejected the Magistrate's recommendation and on October 17, 1996 granted summary judgment to the District on the ground that it was not Appellant's employer within the meaning of Title VII.

Petitioner proceeded to trial on his claims against UTHSC-SA and on November 7, 1996 the jury returned a verdict in favor of UTHSC-SA on all of Petitioner's claims.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit which rendered an opinion on January 5, 1999 sustaining the grant of summary judgment to the District and the judgment rendered on the jury verdict in favor of UTHSC-SA. The panel opinion of the Fifth Circuit held that summary judgment was appropriate for the reason that the "joint employer" doctrine is inapplicable in a Title VII employment discrimination case involving two governmental entities.

Petitioner filed a Petition for Rehearing En Banc which was treated as Petition for Panel Rehearing and denied on March 23, 1999.

STATEMENT OF FACTS

UTHSC-SA and the District are independent governmental subdivisions. The District is a subdivision of the State of Texas formed to provide medical, and hospital care to indigents and the needy sick of Bexar County, Texas and to such other persons who may seek medical care and treatment. UTHSC-SA is a medical school formed under the laws of the State of Texas which trains medical students and physicians.

On June 11, 1992, the District and UTHSC-SA entered into a twenty year affiliation agreement. Under that agreement the District delegated to UTHSC-SA the responsibility for the education and supervision of the House Staff at the District's Hospital and the responsibility for organizing, supervising and directing the providing of medical care to patients at the hospital. The District reserved the authority to grant, modify, or revoke clinical privileges and appointments to the Hospital's medical staff. (R. Vol.2, 234-236)

The House Staff consists of resident physicians and fellows enrolled in UTHSC-SA's Residency Training Program who are assigned to the District. The House Staff are assigned to the District subject to its approval. (R. Vol.2, 235). The House Staff abide with the House Staff Manual, the Bylaws of the Medical-Dental Staff, and the policies, rules and regulations of the District. (R.

Vol.1, 166). Policies of discipline, redress of grievances and sexual harassment, are outlined in the House Staff Manual of the District. (R. Vol.1, 167). The President/CEO of the District has the final control and authority for a disciplinary action against the House Staff, and the By-Laws of the Board of Managers and Medical/Dental Staff of the District are the governing documents.

The District determined the annual salary, benefits, withheld federal and social security taxes and provided the House Staff with a Certificate of Training. (R. Vol.1, 166-167).

On June 30, 1993 Petitioner entered into a one-year contract with UTHSC-SA and the District whereby he was accepted as fourth year resident physician in the general surgery residency program. (Pl. Ex. 1). Pursuant to that agreement Petitioner became both a resident physician in the general surgery program at UTHSC-SA and a member of the House Staff at the District's Hospital.

In January 1994, Petitioner was required to pass the American Board of Surgery In-Training Examination. Appellant scored in the 38th percentile on that examination, two percentile points below the passing score of 40th percentile. (R. Vol.1, pp. 217-218; Def. Ex. 22). Another resident in the surgical residency program, Sarah Willard, scored in the 14th percentile. (R. Vol.1, p. 278; Pl. Ex. 12). Surgical residents who score below the 40th percentile on the examination are required to undergo an oral examination by three teams of physicians, which Appellant and Willard

did on May 23, 1994. (R. Vol.1, pp. 217-218). Both Petitioner and Willard failed to receive passing grades in the oral examinations. (R. Vol.1, p. 262). Both were advised that they would be retained in the residency program but would be required to repeat the fourth year of residency on a probationary basis. (R. Vol.1, pp. 257-258).

Petitioner entered into a second surgical residency training contract with UTHSC-SA and the District on July 2, 1994, which had an expiration date of June 30, 1995. (Pl. Ex. 4). Nonetheless, Petitioner was dismissed from the surgical residency on August 31, 1994 (R. Vol.1, p. 225), whereas Willard was retained in the residency program where, despite the fact that in January 1995 she scored in the 8th percentile, of the required 40th percentile, on the American Board of Surgery In-Training Examination, she was permitted to complete the residency program on June 31, 1995 (Pl. Ex. 12; R. Vol.1, pp. 231-232).

REASONS FOR GRANTING THE PETITION

Title VII defines "employer" as "a person engaged in an industry affecting commerce....." *See* 42 U.S.C. § 2000e(b). "Person" is defined as including "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers" *See* 42 U.S.C. § 2000e(a).

Two individual entities may both be found to be a plaintiff's employer for purposes of liability under Title VII under either of two doctrines - the "joint employer" and the "single employer" doctrines. These doctrines approach the issue of "who is the employer" from different perspectives and different standards apply to each. In *Radio Union v. Broadcast Service of Mobile Inc.,* 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965), the Supreme Court enunciated the considerations applicable when applying the "single employer" doctrine, in *Boire v. Greyhound Corp.,* 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964), the factors applicable to the "joint employer" doctrine.

A "single employer" relationship exists where two nominally independent entities are part of an integrated enterprise so that, for all purposes, they are a "single employer". The most relevant inquiry in the "single employer" situation, is whether the two entities for practical purposes constitute a single, integrated enterprise. In *Radio*

Union v. Broadcast Service of Mobile Inc., 380 U.S. at 256, 85 S.Ct. at 877, the Supreme Court examined four factors: (1) the functional integration of operations; (2) centralized control of labor relations; (3) common management; (4) common ownership.

The "joint employer" doctrine, in contrast, does not depend upon the existence of a single integrated enterprise. The Supreme Court, in addressing the question of "joint employers" existed in *Boire v. Greyhound Corp., supra,* focused on whether the two entities, Greyhound Corporation and an independent, unrelated company, Floors, "share or co-determine those matters governing [the] essential terms and conditions of employment of the porters, janitors, and maids," who were employees of Floor working under contract in Greyhound facilities. *See NLRB v. Greyhound Corp.,* 368 F.2d 778, 780 (5th Cir. 1966) (on remand from *Boire v. Greyhound Corp.,* 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964), reversing *Boire v. Greyhound Corp.,* 309 F.2d 397 (5th Cir. 1962)).

In reversing the original Fifth Circuit opinion, the Supreme
Court concluded that:

> Whether Greyhound, as the Board held, possessed sufficient control over the work of the employees to qualify as a joint employer with Floors is a question which is unaffected by any possible determination as to Floors' status as an independent contractor,

since Greyhound has never suggested that the employee themselves occupy an independent contractor status. And *whether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue. Boire v. Greyhound Corp.* 376 U.S. 473, 481,84 S.Ct. 894, 899, 11L.Ed.2d 849 (1964).

On remand, the Fifth Circuit applying this standard concluded that Greyhound and Floors were joint employers of the janitors and porters. *NRLB v. Greyhound Corp.,* 368 F.2d at 781.

In *Trevino v. Celanese Corp.,* 701 F.2d 397, 404 (5th Cir. 1983) , the Fifth Circuit held that the "single employer" doctrine was not applicable to cases where one of the two potential employers was a governmental entity because, "As articulated, the standard is not readily applicable to governmental subdivisions, for it was developed by the National Labor Relations Board to determine whether consolidation of separate private corporations is proper in determining the relevant employer for purposes of enforcing the National Labor Relations Act."

Some courts have joined the Fifth Circuit and concluded that "the [four-part NLRB] standard is not readily applicable to governmental subdivisions [.]" *Trevino v. Celanese Corp.,* 701 F.2d 397, 404 n. 10 (5th Cir. 1983); *Piper v. Junction City Hous. Auth.,* 1995 WL 88232, at *3 (D. Kan. Feb.1, 1995). *See also Massey v.*

Emergency Assistance, Inc., 724 F.2d 690, 692 (8th Cir. 1984) (Lay, C.J., dissenting) ("I think it clear such test is not applicable to a factual situation concerning governmental entities."); *Lyes v. City of Riviera Beach, Florida, et al.*, 166 F.3d 1344 (11th Cir. 1999).

Other courts have adopted the "single employer" NLRB test and apply it to governmental subdivisions. *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 1998 WL 846889, at *6, 161 F.3d 1178 (8th Cir. 1998) (applying without discussion, the NLRB test to a private entity and a government entity and deciding that they should not be combined); *Massey*, 724 F.2d at 690-91 (affirming, without discussion, the district court's application of the NLRB test to a government entity and the decision that it should not be aggregated with a private entity); *Vandermeer v. Douglas Cty.*, 15 F.Supp.2d 970, 974-75 (D. Nev. 1998) (applying NLRB test to county and local fire and paramedic districts, but noting that "[t]he fact that Nevada may consider Douglas County and the Districts to be separate political subdivisions, while relevant, does not control."); *Rivera*, 922 F. Supp. at 949; *County of Pike*, 761 F.Supp. at 76-77 (applying NLRB test to Pike County and Pike County State's Attorney's office in ADEA case, but concluding that they should not be treated as an integrated enterprise).

The Fifth Circuit recognizes the existence of the "joint employer" doctrine but held that is equally inapplicable to governmental entities on the

ground that the "core analysis of these two inquires are virtually identical." (Panel Opinion p. 5.)

The effect of the Fifth Circuit's opinion by excluding the application of both "single employer" and the "joint employer" doctrines, is to insulate governmental entities from Title VII liability without any rational basis for doing so under circumstances where private entities would have liability.

The decision of the Fifth Circuit is contrary to opinions of other Federal Circuits that have applied the "joint employer" doctrine to govermental entities. *Graves v. Lowery,* 117 F.3d 723 (3rd Cir. 1997); *Zinn v. McKune,* 143 F.3d 1353 (10th Cir. 1998).

The Eleven Circuit while it rejected the "single employer" doctrine with its four factor NLRB test as a means of determining whether two or more governmental entities should be aggregated for the purposes of determining if they are an "employer" under Title VII, it adopted another standard that should be applied in its place. *Lyes v. City of Riviera Beach, Florida et al.,* 166 F.3d 1344 (11th Cir. 1999). Under the new standard, "Thus, two or more state or local governmental entities will be treated as a single "employer" under Title VII where one entity exerts or shares control over the fundamental aspects of the employment relationships of another entity, to such a substantial extent that it clearly outweighs the presumption that the entities are distinct." *Lyes v. City of Riviera Beach, Florida et al.,* 166 F.3d 1345 (11th Cir. 1999). The Eleventh Circuit's standard is virtually

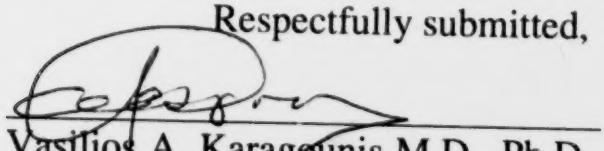
identical to the "joint employer" standard outlined by the Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964).

Guidance from the Supreme Court is needed for national guidelines regarding joint liability of governmental subdivisions under Title VII. The Federal Courts of Appeals have been inconsistent and conflicting with each other regarding the application of the "single employer" or the "joint employer" doctrine. The Fifth Circuit excluded both doctrines from application to governmental entities, making certain that a governmental subdivision will evade the reach of federal employment discrimination law. The Fifth Circuit's decision comes into direct conflict with Congress's unmistakable intent that "Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson,* 433 U.S. 321, 331 n. 14, 97 S.Ct. 2720, 2728 n. 14, 53 L.Ed.2d 786 (1977).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner, Dr. Karagounis respectfully prays that the Supreme Court grants Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

APPENDIX A---UNPUBLISHED PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 5, 1999

UNPUBLISHED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50587
Summary Calendar

VASILIOS A. KARAGOUNIS, M.D., Ph.D.,
Plaintiff-Appellant,
versus

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO; UNIVERSITY
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-95-CA-799

Before KING, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-appellant Vasilios A. Karagounis brought this Title VII action, alleging sex and national origin employment discrimination, against defendants-appellants the University of Texas Health Science Center at San Antonio ("UTHSC-SA") and Bexar County Hospital District d/b/a University Hospital ("District"). The district court granted summary judgment in favor of the District, and a jury trial resulted in a verdict in favor of UTHSC-SA. Karagounis argues on appeal that the district court should not have entered summary judgment for the District, that the district court should have excluded certain exhibits at trial while admitting others, that the district court committed reversible error in its response to a question asked by the jury, and that the district court erred in denying his motion for a new trial. For the reasons set forth below, we AFFIRM the district court's decisions in this case.

FACTUAL & PROCEDURAL BACKGROUND

Karagounis was a fourth year general surgery resident at UTHSC-SA at the time of the alleged incidents. By way of background, the general residency training program is a five year

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forttt in 5th CIR.R.47.5.4.

program, with each year beginning in July and ending in late June. Prior to becoming a fifth year "chief" resident, fourth year "senior" residents are expected to score above the 40th percentile on the American Board of Surgery In-Training Examination. Karagounis scored in the 38th percentile.

Residents who fell below the minimum score on the Board examinations were required to undergo an oral examination. Karagounis' oral examination was given by three teams of physicians. The first team gave him a four, which was a failing grade. The second team initially gave him a five, which was a conditionally passing grade, but after discussion decreased his grade to a four. The third team did not give him a numerical grade, but instead informed him that he failed his oral examination. At that point, Karagounis was told that he would be retained in the General Surgery residency program but he would have to repeat his fourth year on a probationary basis, beginning in July 1995.

Karagounis's first rotation during this probationary period was in vascular transplants. His performance was rated as unsatisfactory by both faculty members running the rotation. As a result, he was told in August 1994 that he was dismissed from the program, effective December 31, 1994. He participated in two more rotations, in both of which his performance was considered unsatisfactory. On December 31, 1994, Karagounis was officially discharged from UTHSC-SA's general surgery residency program.

In June 1995, Karagounis filed suit against UTHSC-SA and the District claiming that they intentionally discriminated against him by terminating him from the general surgery residency program because of his Greek national origin and his male gender. Both defendants-appellees filed motions for summary judgment. The district court granted summary judgment in favor of the District on the grounds that this defendant was not Karagounis's employer, but denied UTHSC-SA's motion for summary judgment. The remaining portion of the case went to trial, at the conclusion of which the jury returned a verdict for UTHSC-SA. Karagounis filed a motion for a new trial, which subsequently denied by the district court. This appeal followed.

DISCUSSION

I.

Karagounis first attacks the district court's decision granting summary judgment to the District on the ground that it was not his employer within the meaning of Title VII. To establish Title VII liability on the part of a particular defendant, Karagounis must prove, *inter alia,* that an employment relationship existed between him and that defendant. *See Deal v. State Farm County Mutual Ins. Co.,* 5 F.3d 117, 118 (5th Cir. 1993).

One way to effectively bypass this requirement is to prove that the defendant in question is sufficiently interrelated with another defendant. The plaintiff can show that the two

defendants are so integrated so as to be considered a "single employer". *See Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Trevino v. Celanese Corporation*, 701 F.2d 397, 403-404 (5th Cir. 1983). The plaintiff can also show that the defendant in question exercises such control over the labor relations of the other defendant that they together should be considered "joint employer." *See Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Trevino*, 701 F.2d at 403.

In this case, the District moved for summary judgment and argued that it was not Karagounis' employer for purposes of Title VII. The district court granted summary judgment after holding Karagounis could not as a matter of law prove that the District and UTHSC-SA should be considered a single employer. The court premised its ruling on our decision in *Trevino v. Celanese Corporation*, 701 F.2d 397, 404 n.10 (5th Cir. 1983) (citing *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n.9 (5th Cir. 1980), in which we held that the single employer theory was not applicable when one of the defendants in question was a governmental subdivision.**

** In *Dkumas*, we set forth the governmental subdivision rule withour explaining the rationale behind it. *See Dumas*, 612 F.2d at 980 n.9. Three years later in *Trevino*, we offered some insight into our reasoning by observing "[a]s articulated, the standard is not readily applicable to governmental subdivisions, for it was 'developed by the National Labor Relations Board to determine whether consolidation of separate private corporations is proper in determining the relevant employer for purposes of enforcing the National Labor Relations Act." *Trevino*, 701 F.2d at 404 n.10 (citation omitted). Other judges have seen *Dumas* in a defferent light than we did in *Trevino*. *See Lyes v.*

On appeal, Karagounis effectively concedes he must rely upon one of the three aggregation theories to have the District considered an employer. He also concedes the district court was correct to foreclose his single employer argument. However, Karagounis argues the district court did not consider his theory that the District and UTHSC-SA should be considered joint employers under the *Boire* doctrine. He submits that our decision in *Trevino* only applied to the single employer theory and not to the joint employer doctrine.

We disagree. It is important to remember that the two theories are very closely related. When determining whether two defendants should be considered a single employer, we look to four factors: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; (4) and common ownership or financial control. *See Trevino,* 701 F.2d at 404. The second factor of this inquiry is by far the most important. *See Id.* Similarly, when determining whether two defendants should be considered a joint employer, we look to the control one defendant has over the other's labor relations. *See, e.g., Triche v. Crescent Turnkey & Engineering,* No. Civ. A. 97-2657, 1998 WL 139986, at *1 n.3 (E.D. La. March 25, 1998). In other words, the core analysis of these two inquiries are virtually

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City of Riviera Beach, 126 F.3d 1380, 1384-85 (11th Cir. 1997) (bound by *Dumas* but not *Trevino), vacated for en banc review,* 136 F.3d 1295 (11th Cir. 1998); *Massey v. Emergency Assistance, Inc.,* 724 F.2d 690, 692 (8th Cir. 1984) (Lay, C.J., dissenting).

identical. *See, e.g., Mochelle v. J. Walter.*, 823F.Supp. 1302 (M.D.La. 1993). Given the similarities between the two, we are constrained by *Trevino* to hold that the governmental subdivision rule we applied within the single employer doctrine also applies to the joint employer theory. To hold otherwise would, in effect, allow an end run around the precedent we established in *Dumas* and *Trevino*. We therefore affirm the district court's grant of summary judgment.

II.

Karagounis next argues that the district court erred in admitting three resident evaluation forms prepared by UTHSC-SA faculty after the decision to dismiss him had been made. We review evidentiary rulings for abuse of discretion. *see, e.g., Big John, B.V. v. Indian Head Grain Co.*, 718 F.2d 143, 146 (5th Cir. 1983), and will reverse only if the error caused substantial prejudice. *See, e.g., Smith v. Wal-Mart Stores,* 891 F.2d 1177, 1180 (5th Cir. 1990). We affirm. Karagounis was permitted to argue to the jury that these evaluations were unreliable because of the date they were prepared. On these facts, we cannot say the admission of this evidence caused substantial prejudice to Karagounis.

III.

Karagounis also contends that the district court erred in responding to a question posed by

the jury during its deliberations. The jury sent the following question to the district court:

> What date was the lawsuit presented to the UT Health Science Center at S.A.?

The district court responded to this question with the following reply:

> Your question, "What date was the lawsuit presented to the UT Health Science Center at S.A." seeks information that is not relevant to any factual issue that you must determine in this case. Again, please follow the instructions given to you by the Court.

Although conceding that a direct answer to this question-June 28, 1995-would not have helped his case in any way, Karagounis suggests that we can infer that the jury was posing this question so as to better evaluate the veracity of those who prepared his post-dismissal residency evaluations. On appeal, therefore, Karagounis appears to argue that the district court's response should have been to provide not only the answer to the jury's question, but additional information which the jury had not directly asked for but could reasonably be expected to desire.

We need not reach this issue. UTHSC-SA correctly observes that Karagounis did not object on the ground that the response should have been to provide the correct answer. Rather, he objected on

the ground that "a neutral response should be given that they are to follow evidence as they heard it without commenting on relevance or non-relevance of the evidence." In confining his objection to the "neutrality' of the district court's response, he waived his objections as to the substance of the district court's response. *See, e.g., First National Bank of Louisville v. Lustig,* 96 F.3d 1554, 1571 n.14 (5th Cir. 1996). On appeal, Karagounis does not contest the district court's decision to overrule his "neutrality" objection, and that too is therefore waived. *See, e.g. Melton v. Teachers Ins. § Annuity Assoc. of America,* 114 F.3d 557, 560 (5th Cir. 1997).

IV.

Karagounis also submits that the district court erred in admitting two resident evaluation summaries prepared by the director of the residency program because they were not factually accurate. In making this claim, Karagounis relies on our decision in *Wright v. Southwest Bank,* 554 F.2d 661 (5th Cir. 1977) in which we remanded a grant of summary judgment on the ground that the summaries relied upon by the district court were incompetent. However, *Wright* is inapplicable to the case at bar. In *Wright,* the district court judge relied on evidence submitted to the court three weeks after the bench trial was concluded. *See id.* at 662. More importantly, the evidence was submitted *ex parte,* meaning that the plaintiff was never provided the opportunity to test the competency of

the relied upon evidence. *See id.* In contrast, Karagounis was provided ample opportunity to test the accuracy of the submitted evidence in the district court. Furthermore, after reviewing the factual claims made by plaintiff on appeal, we cannot say the district court abused its discretion in admitting this evidence. We therefore affirm.

V.

Karagounis further claims that the district court erred in excluding as testimony as portion of an audio taped conversation between himself and Dr. J. Bradley Aust, which Karagounis covertly recorded. He did not attempt to admit this excerpt during the case-in-chief, but instead attempted to do so during the rebuttal portion of the trial. The most relevant portion of the conversation Karagounis points to as evidence of direct discrimination is Aust's statement that:

> So really, I need to have you tell me, what can I do to help you find something else? Are you going back to Greece? Are you going to find another spot here? What are you going to do? What can we do to help you? I don't think you should be in surgery. That's my view. On the basis of what the rest of the faculty tells me. I' m very concerned.

The district court did not abuse its discretion in excluding this testimony. While it has a reference to the plaintiff's national background, in context the statement is innocuous and not evidence of discrimination. In particular, we note that Aust immediately followed his question of whether Karagounis was planning to return to Greece with a question of whether he was planning to stay in America. If anything, the statement in its entirety shows Aust's honest assessment of Karagounis and his ultimate concern for Karagounis' placement after he left the residency program. On these facts, we cannot say the district court's decision substantially prejudiced Karagounis' case.

VI.

Finally, Karagounis argues that the district court erred in denying his motion for a new trial. We will reverse a district court's decision denying a new trial motion only if the court abused its discretion or misapprehended the law. *See, e.g., Dixon v. International Harvester Co.,* 754 F.2d 573, 586 (5th Cir. 1985). Karagounis' argument is premised on the claim that counsel for UTHSC-SA fraudulently talked his attorney out of playing audio tapes of conversations between himself and several UTHSC-SA faculty members. He offers no support for this claim except his personal suspicions. As the district court correctly observed, plaintiff neither explains how defense counsel fraudulently induced his attorney, nor specifies the basis for his allegations. Karagounis only cites to

the fact that his attorney decided not to play the audio tapes after a conversation with defense counsel.

The district court certainly did not abuse its discretion in refusing to presume a conversation between two licensed attorneys contained fraud. As such, we dismiss this claim as entirely without merit, and affirm the district court's decision to deny the new trial motion without an evidentiary hearing.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's decisions.

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, GRANTING SUMMARY JUDGMENT AS TO DEFENDANT BCHD AND DENYING SUMMARY JUDGMENT AS TO DEFENDANT UTHSCSA, FILED OCTOBER 17. 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-95-CA-799

VASILIOS A. KARAGOUNIS

Plaintiff,

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO, and UNIVERSITY HOSPITAL,

Defendant (s).

ORDER ACCEPTING, IN PART, MAGISTRATE JUDGE'S RECOMMENDATION, GRANTING SUMMARY JUDGMENT AS TO DEFENDANT BCHD AND DENYING SUMMARY JUDGMENT AS TO DEFENDANT UTHSCSA

Before the Court is the Memorandum and Recommendation of the United States Magistrate Judge, filed on July 18, 1996, and the objections to the Memorandum and Recommendation, filed by Defendant Bexar County Hospital District (BCHD) on August 4, 1996 and by Defendant University of Texas Health Science Center at San Antonio (UTHSCSA) on August 5, 1996. The Court also considers Plaintiff's Vasilios A. Karagounis's response to those objections, filed on August 13, 1996.

Where no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of it. *See* 28 U.S.C. § 636 (b) (1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir.), *cert. denied,* 492 U.S. 918 (1989).

On the other hand, if any party objects to the Memorandum and Recommendation, the Court must review it de novo. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or

general in nature. *Battle v. United States Parole Comm'n,* 834 F.2d 419, 421 (5th Cir. 1987).

Because both UTHSCSA and BCHD object to the Memorandum and Recommendation, the Court reviews de novo the merits of their respective motions for summary judgment. Each Defendant moved for summary judgment on the grounds that it was not an "employer" for the purposes of liability under Title VII. In his Memorandum and Recommendation, the Magistrate Judge undertook an exhaustive analysis of this question, ultimately concluding that there was a genuine issue of material fact whether UTHSCSA and BCHD could be considered a single-integrated enterprise which, together, constituted Karagounis's sole employer. Both Defendants dispute this finding, each pointing at the other as being Karagounis's true employer. The Court concludes that the single-integrated enterprise doctrine is inapplicable in these circumstances and that Defendant UTHSCSA is properly considered to be Karagounis's employer.

In his Memorandum and Recommendation, the Magistrate Judge relied on the Fifth Circuit's decision in *Trevino v. Celenese Corp.* 701 F.2d 397 (5th Cir. 1983), to find that UTHSCSA and BCHD were single-integrated enterprise. (*See* Mem. & Rec. at 15-20.) In that decision, the Fifth Circuit applied this doctrine, first developed in the labor relations arena, to a Title VII claim. *See Id.* at. 403-404. The Plaintiff in *Trevino* was actually employed by ABI, but Celanese Corporation, the company to which the plaintiff was assigned, collaborated on employment and layoff decisions

to the extent that it exercised "considerable control" over ABI employees, even though no formal employment relationship existed. *Id.* at 404. Consequently, the appellate court held that the two companies, ABI and Celanese, could be considered a single-integrated enterprise for the purposes of Title VII liability.

The Magistrate Judge makes no reference, however, to a footnote in *Trevino* in which the Fifth Circuit cautioned that the single-integrated enterprise doctrine "is not readily applicable to governmental subdivisions, for it was 'developed by the National Labor Relations Board to determine whether consolidation of separate *private* corporations is proper in determining the relevant employer for the purposes of enforcing the National Labor Relations Act.'" *Id.* at 404 n. 10 (citing *Owens v. Rush,* 636 F.2d 283, 296 n.2 (10th Cir. 1980)); *see also Dumas v. Town of Mt. Vernon, Ala.,* 612 F.2d 974, 979 n. 9 (5th Cir. declining to apply doctrine to town, county and state. As one court explained, factors such as "common ownership or financial control" and "centralized control of labor relations" necessary in the context of government entities because "[t]here is no notion of 'ownership' or 'financial' control" by a government entity as there is, for example, with a subsidiary and parent corporation or two horizontally integrated companies. *Massey v. Emergency Assistance, Inc.,* 724 F.2d 690, 692 (8th Cir. 1984) (Lay, C.J., dissenting), *cert. denied,* 469 U.S. 930 (1984).

Here, Defendant UTHSCSA is an "educational agency of the State of Texas" and Defendant BCHD is a "political subdivision of the State of Texas." (Pl.'s Opp'n Mot. Summ. J., Ex. D at 1.) Because both Defendants are governmental entities, this Court must adhere to the Fifth Circuit's direction, also followed by other courts, that the single-integrated entity doctrine is not appropriate when dealing with governmental, rather than private, entities. *See Piper v. Junction City Hous. Auth.,* No. 93-4173-RDR, 1995 WL 88232 at *3 (D. Kan. Feb. 1, 1995) (following *Massey* dissent to hold that single-integrated entity test appropriate only for determining joint control between private companies); *Poulin v. City of Houston Health Dept.,* Civ. A. No. H-85-6757, 1986 WL 13790 at *1 (S.D. Tex. Nov. 16, 1986) (because Fifth Circuit has declined to apply doctrine to government entities "there can be no integrated enterprise liability among government employers"). *But see Riley v. County of Pike,* 761 F. Supp. 74, 76-77 (applying *Trevino* factors and additional state law criteria to determine that county entities did not comprise a single-integrated enterprise).

Consequently, the Court must consider whether either Defendant, independently, can be considered an "employer" for the purpose of Title VII. "Determining whether a defendant is an "employer" under Title VII .... involves a two-step process. First, the defendant must fall within the statutory definition. Second, there must be an employment relationship between the plaintiff and

the defendant." *Deal v. State Farm County Mut. Ins. Co.,* 5 F.3d 117, 118 n. 2 (5th Cir. 1993). In this case, there is no dispute that both Defendants meet the statutory definition of an "employer," that is, they employ the requisite number of persons and otherwise fall within the provisions of Title VII. The central issue in this case is whether Karagounis had an employment relationship with either.

As the Magistrate Judge correctly noted, in the Fifth Circuit, a "hybrid test," which includes elements of both the economic realities and the common law control approaches, applies to determine whether an employment relationship exists. *Id.* at 118-119; *see also Fields v. Hallsville Indep. Sch. Dist.,* 906 F.2d 1017, 1019 (5th Cir. 1990), *cert. denied,* 498 U.S. 1026 (1991); *Mares v. Marsh,* 777 F.2d 1066, 1067-68 (5th Cir. 1985). Under this test, the right to control an employee's conduct is the most important component. *Deal,* 5 F.3d at 119. The Court must consider "whether the alleged employer had the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule." *Id.* A second component, the economic realities of the relationship, focuses on whether the plaintiff, "'as a matter of economic reality, is dependent upon the business to which [he] render[s] service.'" *Mares v. Marsh,* 777 F.2d at 1067 (citing *Hickey v. Arkla Indus., Inc.,* 699 F.2d 748, 751 (5th Cir. 1983)). Among the factors to be considered are "whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms

and conditions of employment." *Deal,* 5 F.3d at 119.

In his Memorandum and Recommendation, the Magistrate Judge concluded that Karagounis had an employment relationship with BCHD because "BCHD had at least some right to control Karagounis' performance and [] BCHD exercised that control to a significant degree." (Mem. & Rec. at 13.) In addition, he found that, "as a matter of economic reality .....BCHD paid his salary, provided him with a place to work and provided him with fringe benefits," and Karagounis could not maintain staff privileges at any other hospital. (Mem. & Rec. at 14.) On the other hand, the Magistrate Judge concluded that Karagounis did not have a direct employment relationship with UTHSCSA because he received no remuneration from the institution, and UTHSCSA's only control over Karagounis was not as employer to employee, but as teacher to student. (*See* Mem. & Rec. at 15.) This Court reaches the opposite conclusion.

The analysis of whether an employment relationship exists would be simple if this case involved a residency program administered by the same hospital in which Mr. Karagounis's training occurred. In such circumstances, there appears little doubt that working in a residency program constitutes employment, and that the position of resident is one protected under Title VII. *See, e.g., Saville v. Houston County Healthcare Auth.,* 852 F. Supp. 1512 (M.D. Ala. 1994) (treating student in nurse anesthesia program as employee under Title VII); *Mallare v. St. Luke's Hospital of Bethehem,*

Civ. A. No. 86-7291, 1989 WL 156304 at *1 (E.D. Pa. Dec. 21, 1989) ("permission to practice at defendant hospital was a privilege of employment as a resident which could not be denied for discriminatory reasons under Title VII"), *aff'd,* 914 F.2d 243 (3d Cir. 1990); *Amo v. St. Luke's Hospital of Bethlehem, Pa.,* No. Civ. A. 84-1355, 1986 WL 766 at *4 (E.D. Pa. Jan. 13, 1986) ("the right to be considered for staff privileges at St. Luke's was a fringe benefit of being a surgical resident and the denial of these staff privileges would be under the protection of Title VII"). The question here, apparently one of first impression, is whether that employment relationship, which includes elements of both labor and learning, dissolves when the institution administering the residency program contracts to place its residents at a separate and independent hospital facility which pays the residents' salaries and provides certain additional employment benefits. Under the facts of this case, the answer is no.

The Court first takes guidance from the Fifth Circuit's recent decision in *Rowinsky v. Bryan Independent School District,* 80 F.3d 1006 (5th Cir. 1996). There the appellate court observed, albeit in dicta, that "the unique nature of dental and medical schools makes its students quasi-employees." *Id.* at 1010 n. 8. To support this statement, the appellate court cited *Lipsett v. University of Puerto Rico,* a case in which the First Circuit applied Title VII standards to determine that medical school resident was an employee for the purposes of a sexual harassment claim under

Title IX. 864 F.2d 881, 897 (1st Cir. 1988). In *Lipsett* court found "no difficulty extending the Title VII standard to discriminatory treatment by a supervisor in the mixed employment-training context," holding that the plaintiff was both an employee and a student in the program, because she both received a salary and training. *Id.*[1]

Second, even without reliance on the statement in *Rowinsky,* application of the Fifth Circuit's hybrid economic realities/common law control test leads to the same conclusion. Focusing on the most important factor of this test, control over the decision to terminate Karagounis's participation in the residency program, the undisputed fact demonstrate that, as a matter of contract and of practice, Karagounis's performance as surgical resident was controlled by UTHSCSA and not BCHD.

Under the Affiliation Agreement between BCHD and UTHSCSA, BCHD delegated to UTHSCSA "the responsibility for directing and providing professional medical and dental care of patients at [University] Hospital." (Pl.'s Opp'n Mot. Summ. J., Ex D at 3.) BCHD's lack of authority over residents is similarly reflected in the Graduate Medical Training Agreement. In that document, the

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[1] The record in *Lipsett* is unclear whether the plaintiff's salary was paid by UPR or the Veteran's Administration hospital through which she rotated. *See Lipsett v. Rive-Mora,* 669 F. Supp. 1188, 1193 (D.P.R. 1987) (*Lipsett III*) (dismissing claim against VA hospital, even though it paid "for six or seven of the residents' stipend[s] and its staff evaluates residents." because final decision on participation in program made by UPR, not hospital), *rev'd on other grounds,* 864F.2d 897 (1st Cir. 1988).

BCHD disclaims any right to control the resident's practice of medicine. ((BCHD's Mot. Summ. J., Ex. I, ¶ 1.02.) Instead, a resident's "duties, duration and sequence of assignment, [and] practice privileges...are determined by department Chairperson or Program Director" at UTHSCSA. (*Id.* ¶ 6.01.) Finally, no party disputes that the actual decision to terminate Karagounis from the program was made by Dr. Kenneth Sirinek, the Director of the General Surgery Program, and Mr. Jay Bradley Aust, the Chairman of the General Surgery Department at UTHSCSA. While both these gentlemen also held staff appointments at BCHD, nothing in the record suggests that either was acting in such capacity when making the decision to terminate Karagounis from the program. *Compare Zaklama v. Mt. Sinai Medical Ctr.*, 842 F.2d 291, 294-95 (11th Cir. 1988) (hospital through which resident rotated liable where resident's dismissal from program was direct result of adverse evaluations from hospital's doctors, not those of institution administering program).

Likewise, the economic realities of Karagounis's relationship with UTHSCSA points to the same conclusion. Karagounis was dependent upon his continued participation in UTHSCSA's residency to sustain his livelihood. The Graduate Medical Training Agreement between Karagounis, UTHSCSA and BCHD required Karagounis to remain in good standing in the residency program as a condition to maintaining staff privileges at BCHD, and Karagounis was prohibited from

charging patients for his services. (*See* BCHD's Mot. Summ. J., Ex. I, ¶ 2.02.) Once dismissed from the program, Karagounis ipso facto could not practice at BCHD. (*Id.*) While it is true that BCHD, and not UTHSCSA, paid Karagounis's salary and provided his health, life and disability insurance, UTHSCSA was responsible for Karagounis's professional liability coverage, approved vacation and leave requests, and was to maintain an office to manage 'issues of sexual harassment and exploitation." (*See* Pl.'s Opp'n Mot. Summ. J., Ex. C at 46, 48, 51). Consequently, the totality of the circumstances indicate that, not only did UTHSCSA exercise control over Karagounis's performance as a surgical resident, but as a matter of economic reality, UTHSCSA was Karagounis's employer.[2] *See Ivan v. Kent State Unversity* , 863 F. Supp. 581, 585 (N.D. Ohio 1994) (under economic realities test, totality of circumstances demonstrated that graduate student an employee under terms of Title VII), *aff'd,* No. 94-4090, 1996 WL 422496 (6th Cir. July 26, 1996); EEOC Dec. No. 88-1, 47 FEP Cas. (BNA) 1887 (June 27, 1988) (holding that resident physician had employment relationship

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[2] UTHSCSA argues that other factors point to the conclusion that Karagounis was not its employee. It notes that UTHSCSA "did not furnish the equipment used at BCHD" and that "the services [Karagounis] performed were an integral part of [BCHD's] business, not essential to UTHSCSA's business." (UTHSCSA's Opp'n Pl.'s Mot. Summ. J. at 9.) This argument overlooks the fact that UTHSCSA cannot competently perform its business of educating medical and dental residents without access to hospital facilities, and that it has for over twenty years contracted with BCHD to provide those facilities, and arrangement which benefits both BCHD and UTHSCSA. (*See* Pl.'s Opp'n BCHD's Mot. Summ. J., Ex. D at 1.)

with educational institution even though compensation and benefits provided by separate nonprofit corporation).

Because BCHD cannot be considered Karagounis's employer, summary judgment must be granted in its favor. Similarly, for the above reasons, UTHSCSA's motion for summary judgment must be denied. The Court does not consider, with respect to Defendant UTHSCSA, whether Plaintiff has presented sufficient evidence to establish a prima facie case of discrimination, since UTHSCSA did not move for summary judgment on this basis. Accordingly,

IT IS ORDERED THAT the Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on July 18, 1996 be and is ACCEPTED, in part, and REJECTED, in part, pursuant to 28 U.S.C. § 636(b) (1); and

IT IS FURTHER ORDERED that Defendant BCHD's motion for summary judgment is GRANTED and the claims against it are hereby DISMISSED; and

IT IS FURTHER ORDERED that Defendant UTHSCSA's motion for summary judgment is DENIED.

SIGNED AND ENTERED this 17 day of October, 1996.

"s/ ".

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX C MEMORANDUM AND RECOMMENDATION OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED ON JULY18,1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-95-CA-799

VASILIOS A. KARAGOUNIS

Plaintiff (s),

UNIVERSITY OF TEXAS
HEALTH SCIENCE CENTER
AT SAN ANTONIO,
and UNIVERSITY HOSPITAL

Defendant (s).

MEMORANDUM
AND RECOMMENDATION

Plaintiff Vasilios A. Karagounis instituted this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e at seq. Karagounis is a medical doctor who claims he was discriminated against during his training as a resident physician in a surgery program operated by one of the defendants, the University of Texas Health Science Center at San Antonio and operated by the other defendant, Bexar County Hospital District d/b/a University Hospital (the "BCHD"). Specifically, Karagounis alleges that he was discriminated against because of his male gender and Grecian national origin.

BCHD has moved or summary judgment alleging that it was not subject to liability because (1) it was not Karagounis' employer, and (2) no agent or employee of BCHD engaged in any prohibited act or conduct in violation of Title VII. (Docket no. 22). UTHSCSA has also moved for summary judgment on the basis that it was not Karagounis' employer for Title VII purposes. To counter these arguments, Karagounis contends that he was, in fact, an employee of UTHSCSA and BCHD, or alternatively, UTHSCSA and BCHD were a single-integrated enterprise that together constituted his sole employer. Karagounis also proffered evidence which he contends establishes a genuine issue of fact of discrimination by BCHD.

STATEMENT OF FACTS

Karagounis needs to complete a surgery residency before he is qualified to secure

employment as a surgeon. In July 1993, he enrolled in a residency program as a fourth year surgical student. Specifically, Karagounis enrolled as a resident physician in the surgery program operated by UTHSCSA located at University Hospital in San Antonio. As part of the enrollment, he signed a Graduate Medical Training Agreement (docket no. 28, exhibit 2) ("GMT- Agreement"), a triparty arrangement among Karagounis, BCHD and UTHSCSA.

General, UTHSCSA promotes fourth-year residents, who satisfactorily complete their fourth year, to fifth year Chief Residents. In January 1994, Karagounis took the written American Board of Surgery In-Training Examination to advance to Chief Resident. Karagounis failed the written examination and was required to take an oral examination conducted by six UTHSCSA surgeons. He failed the oral examination and was not promoted to Chief Resident. He continued in the residency program until December 31, 1994, when he was discharged. Five other resident physicians were promoted to Chief Residents. Of the five other physicians, four were male and one was female. None of them was of Grecian origin.

SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(b) provides that a defending party may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and

evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of genuine issue of material fact. *Celotex Corp, v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him Fed.R.Civ.P. 56(e).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson,* 477 U.S. at 247-248, 106 S.Ct. at 2510.

The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* All of the evidence and inferences drawn from that evidence must be viewed in the light most favorable to the

party opposing the motion for summary judgment. *Hibernia National Bank v. Carner,* 997 F.2d 94, 97 (5th Cir. 1993).

DISCUSSION

Title VII of the Civil Rights Act of 1964 was enacted to provide equality of employment opportunities by eliminating employment practices that discriminate on the basis of race, color, religion, sex, or national origin. *Diggs v. Harris Hospital-Methodist, Inc.,* 847 F.2d 270, 271 (5th Cir.), *cert. denied,* 488 U.S. 956 (1988). The Act specifically provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1). An employment, relationship between the plaintiff and defendant is a prerequisite to maintaining a Title VII claim of discrimination. *Deal v. State Farm County Mutual Ins. Co. of Texas,* 5 F.3d 117, 118 n. 2 (5th Cir. 1993).

In the instant case, BCHD argues that it is entitled to summary judgment because there was no employment relationship between BCHD and Karagounis. BCHD contends that Karagounis was an independent contractor over whom it exerted no control. UTHSCSA argues that it is also entitled to summary judgment because an employment

relationship did not exist between UTHSCSA and Karagounis. According to UTHSCSA, Karagounis was an independent contractor of BCHD. Karagounis, on the other hand, argues that he was an employee of both UTHSCSA and BCHD. Karagounis also argues that BCHD and UTHSCSA are a single-integrated enterprise that constitutes Karagounis' sole employer. The Court will first examine whether UTHSCSA and BCHD were Karagounis' employer. Then the Court will decide whether UTHSCSA and BCHD can be considered a single-integrated enterprise for discrimination purposes. Following the discussion of the employment relationship between the parties, the Court will examine whether Karagounis has presented sufficient evidence to establish a genuine issue of fact of discrimination by BCHD.

EMPLOYMENT RELATIONSHIP

To establish Title VII liability, Karagounis must prove both that defendants meet the statutory definition of "employer" and that an employment relationship exists between defendants and Karagounis. *Deal v. State Farm County Mutual Ins. Co. of Texas,* 5 F.3d at 118. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty of more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. §2000e(b) (1994). It is undisputed that

defendants meet the statutory definition of "employer."

Next, the Court must determine whether an employment relationship existed. The Fifth Circuit has identified three tests to determine whether a person is an employee or an independent contractor. *Mares v. Marsh,* 777 F.2d 1066, 1067 (5th Cir. 1985). These tests are known as the "agency," "economic realities," and the "hybrid" tests. *Id.* The agency test turns on the employer's right to control. *Id.* The second test, which evolved in Fair Labor Standards Act cases turns on whether the person as a matter of economic reality depends on the business to which they render service. *Id.* The third test is the hybrid test. As its name suggests, this test combines the other two tests by considering the economic realities of the work relationship as an important factor in the formula, but focuses more on the degree to which the employer has the right to control the "means and manner" of the worker's performance. *Id.* The hybrid test is also known as the *Spirides* test because it first evolved in *Spirides v. Reinhart,* 613 F.2d 826, 831 (D.C. Cir. 1979).

The hybrid test, which the Fifth Circuit has renamed the "economic realities/common law control test," is appropriate in the instant case. *See Diggs,* 847 F.2d at 271, & 272 n. 1 (applying hybrid test to determine if medical doctor was an employee of hospital). The most important component of this test is the "extent to which the one for whom the work is being done has the right to control the details and means by which the work

is to be performed." *Id.; Deal,* 5 F.3d at 119. In analyzing the control component, the Court must focus on whether the alleged employer has authority to hire and fire the employee, the right to supervise the employee, and the right to set the employee's schedule. *Id.* The economic realities component looks at whether the employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment. *Id.* There are 11 factors to guide the Court in determining whether a worker is an independent contractor or an employee:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e. by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer;" (9) whether the worker accumulates retirement benefits; (10)

> whether the 'employer' pays social security taxes; and (11) the intention of the parties.

Diggs, 847 F.2d at 272-73 (quoting *Broussard v. L.H. Bossier, Inc.,* 789 F.2d 1158, 1159 (5th Cir. 1986)).

The first two factors look at whether the work is usually done under the direction of a supervisor. The practice or surgery is the type of work that requires a high skill level and is not usually done under the supervision of another. However, in this case, all of Karagounis' work was performed under the direct supervision of another doctor. Under the terms of the GMT Agreement, Karagounis agreed that he could not treat any patients, except under the "supervision of an active or courtesy staff physician." (Docket no. 28, ¶ 3.01.) Thus, although surgery is usually the type of work that is **not** done under the supervision of another, Karagounis' work, in this case, was performed under the direct supervision of another doctor. These factors suggest an employment relationship.

The next factor examines who furnishes the equipment for the job and the place of work. In this case, BCHD furnished both the equipment and the place to perform the surgery. UTHSCSA, on the other hand, provided only malpractice insurance for Karagounis. These factors suggest that BCHD was Karagounis' employer, but that UTHSCSA was not.

The next two factors are the length of time the individual is employed and the method of payment. Karagounis signed two one-year contracts with BCHD and UTHSCSA. (Docket no. 28, exhibits 1 & 2). An employment contract term of one year suggests that an employment relationship was created. *See Robicheasux v. Radcliff Material,* Inc., 697 F.2d 662, 666 (5th Cir. 1983). It was during the term of the second contract that Karagounis was discharged from the residency program. BCHD paid Karagounis a stipend of $31,408.00 a year which was paid in bi-weekly installments. (Docket no. 28, ¶ 4.01). Since BCHD paid Karagounis a stipend, BCHD was his employer from the "economic reality" standpoint. *Ivan v. Kent State University,* 863 F.Supp. 581, 585 (N.D. Ohio 1994) (holding graduate student was an employee of university that paid her stipend). On the other hand, UTHSCSA did not pay Karagounis for residency work.

The next factor looks at the manner in which the relationship is terminated and whether notice is required for the termination. The GMT Agreement does not specify whether notice is required to terminate the relationship. Karagounis testified by affidavit that in mid-August 1994, he was advised by Dr. Kenneth Sirinek, the director of the General Surgery Residency program, that he was being dismissed from the program effective August 31, 1994. (Docket no. 28, Karagounis affidavit, ¶ 7). According to Karagounis, Dr. Sirinek advised Karagounis that only Dr. Jay Bradley Aust could change the mandate that he be dismissed. Dr. Aust

was the chairman of the General Surgery Department at UTHSCSA and was also the chairman of the General Surgery Department at University Hospital. (*Id. at ¶ 4*). After discussions with Drs. Aust and Sirinek, Karagounis continued to work until December 31, 1994. (*Id.* at ¶ 7). Thus, although the GMT Agreement does not specify how much notice was needed to terminate the relationship among the parties, it is apparent that Karagounis was given several months notice of his discharge.

Three of the remaining factors deal with the employee's benefits including annual leave, retirement benefits, and payment of social security taxes. The BCHD paid Karagounis' social security taxes and provided him with annual leave. As a retirement plan, BCHD provided the house staff with deferred compensation plan. (Docket no. 30, attachment 4, page 50). By paying Karagounis' salary and providing him with fringe benefits, BCHD was acting as an employer. There is no evidence, however that UTHSCSA was directly responsible for providing Karagounis with annual leave, paying his social security taxes, or providing retirement benefits.

Another factor is whether the work performed is an integral part of the business of the employer. The business of BCHD is "primarily to provide medical and hospital care to indigent and needy persons residing in Bexar County, Texas." (Docket no. 28, exhibit D, page 1). As a surgery resident, Karagounis performed such services. Thus, Karagounis' work was performed as an

integral part of BCHD's business. UTHSCSA's business, on the other hand, is educating students. There is no evidence that Karagounis was involved in educating students; thus, the work he performed was not an integral part of UTHSCSA's business.

The final factor is the intention of the parties.The GMT Agreement provides for an independent contractor relationship between the parties. A contractual provision that states that a person is an independent contractor is relevant but not dispositive of the issue of whether an employment relationship exists. *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983). Karagounis argues that the parties intended Karagounis to be an employee of UTHSCSA because (1) Karagounis signed a form indicating that he accepted the "position of PG-IV General Surgery Resident at the Bexar County Hospital District Teaching Hospitals/University of Texas Health Science Center at San Antonio..." (docket no. 34, unnumbered exhibit), and (2) Dr. Sirinek, the Director of the General Surgery Residency Program, wrote a letter that acknowledged that Dr. Karagounis was an employee of UTHSCSA (docket no. 34, unumbered exhibits). The fact that Karagounis signed a document to accept a "position" does not establish that he was an employee. This fact could equally be interpreted to mean that he accepted a position of "independent contractor." Dr. Sirinek's letter is also insufficient to establish an employment relationship because the other factors indicate that an employment relationship was not created with UTHSCSA.

The Court must consider the overall issues of whether defendants had a right to control Karagounis manner of performance and whether Karagounis was dependent upon defendants as a matter of economic reality. With regard to the right to control Karagounis' manner of performance, the Affiliation Agreement, entered into by BCHD and UTHSCSA, specifies that BCHD shall "delegate" to UTHSCSA the responsibility for professional supervision and education of the resident physicians. (Docket no. 28, exhibit D, page 3). In particular, the Affiliation Agreement provide as follows:

> The duty to provide medical care, treatment, and hospitalization to patients at the [University Hospital] is by law vested in the [BCHD] and [BCHD] shall discharge this responsibility by : ....(3) delegating to [UTHSCSA] the responsibility for professional supervision and education of the House Staff as well as authority and responsibility for directing and providing professional medical and dental care of patients at [University] Hospital while maintaining the [BCHD]'s authority to grant, modify, or revoke clinical privileges and appointments to the Medical-Dental Staff.

(*Id.*) The above quoted language shows that BCHD had authority to control Karagounis' performance, but delegated that authority to UTHSCSA subject to BCHD's right to grant, modify, or revoke clinical privileges.

It appears that this paragraph conflicts with GMT Agreement that states that BCHD has no control over staff physicians. (Docket no. 22, exhibit I, section 1.02). It specifically states as follows:

> The parties understand that the HOUSE STAFF PHYSICIAN performs tasks, namely the practice of medicine, the details of which the SYSTEM does not have legal right to control and no such control is assumed by this Agreement.

(*Id.*) To resolve the apparent conflict, these provisions may be interpreted to mean that BCHD had the right to control Karagounis' performance, but under the terms of the Affiliation Agreement, BCHD delegated this authority to UTHSCSA and, therefore, when BCHD entered into the GMT agreement, BCHD no longer had the right of control. At any rate, there is sufficient evidence to show that BCHD had at least some right to control Karagounis' performance and that BCHD exercised that control to a significant degree.

Further evidence of BCHD's control over Karagounis is found in the House Staff Manual which was given to Karagounis by BCHD. (Docket

no. 28, exhibit C). The House Staff Manual provides for a grievance and discipline procedure for resident doctors.(*Id.* page 45). Under the grievance and discipline procedures, the House Staff was required to follow the rules and regulations set by president/CEO of the BCHD. If a House Staff resident failed to perform his assigned duties, an Executive Committee could recommend appropriate disciplinary action to the president/CEO of BCHD. The staff manual also provided for substance and chemical abuse counseling and sexual harassment counseling. (*Id.* page 46). In addition to salary provisions, the manual provides that the residents could receive meal tickets and uniforms for use at the hospital. Any vacation, family, or sick leave requested by a resident had to be approved by the BCHD staff. (*Id.* page 48). These conditions of employment demonstrate that BCHD had a high degree of control over the residents.

It appears that UTHSCSA also maintained control of Dr. Karagounis. According to George B. Hernandez, Jr., Vice President/Legal Services of BCHD, UTHSCSA employees controlled Karagounis' duties, direction and sequence of assignment. (Docket no. 22, exhibit A, page 3). While right to control is the most important factor in the hybrid test, it is not the only factor. As noted above, Karagounis was not dependent in any way on UTHSCSA for financial support. Their relationship, when considered independently of BCHD, was that of student/teacher as opposed to employee/employer. The control exercised by

UTHSCSA was that of an educational instructor, not an employer.

Based on the *Spirides* factors, the evidence shows that Karagounis does have an employment relationship with BCHD. Karagounis was dependent on BCHD as a matter of economic reality because BCHD paid his salary, provided him a place tot work and provided him with fringe benefits. While in the residency program Karagounis was not allowed to work as a medical doctor at any other hospital or maintain a private practice. (Docket no. 28, Karagounis affidavit, ¶¶ 3 & 6). Since Karagounis could not maintain staff privileges at another hospital, he was economically dependent on BCHD. This is factually very different from the *Diggs* case in which the Fifth Circuit held a regular staff doctor was an independent contractor of the hospital where she held staff privileges because she could obtain staff privileges at many hospitals and was not dependent on that particular hospital as a matter of economic reality. *Diggs,* 847 F.2d at 273. Therefore, both prongs of the economic reality/common law control test are satisfied, and Karagounis must be considered to be BCHD's employee for discrimination purposes.

However, UTHSCSA did not have a direct employment relationship with Karagounis. Karagounis was not dependent on UTHSCSA as a matter of economic reality because UTHSCSA did not pay his salary, provide him a place to work or provide him with any fringe benefits. Although UTHSCSA exerted control over Karagounis' performance, the control was not that of an

employer over an employee. When all of the factors of the *Spirides* test are considered, it is apparent that UTHSCSA did not maintain a direct employment relationship with Karagounis. However, as discussed in the next section, UTHSCSA and BCHD were sufficiently interrelated to be considered Karagounis sole employer for Title VII purposes.

SINGLE-INTEGRATED ENTERPRISE THEORY

Karagounis also takes the position that UTHSCSA and BCHD are a single-integrated enterprise that together constituted his sole employer. The sole employer theory has been applied in Title VII cases in which superficially distinct entities are held liable upon a finding that they constitute a single-integrated enterprise, which is the "sole employer." *Trevino v. Celenese Corporation,* 701 F.2d 397, 403-404 (5th Cir. 1983). In such cases, the following four factors are used to determine whether two separate companies constitute a sole employer: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Garcia v. Elf Atochem North America,* 28 F.3d 446, 450 (5th Cir. 1994); *Trevino,* 701 F.2d at 404. In analyzing these factors it is important to keep in mind that there is a presumption that the two entities are separate employers. *See Frank v. United States West, Inc.,* 3 F.3d 1357, 1362 (10th Cir. 1993);

Johnson v. Flowers Indus., 814 F.2d 978, 980 (4th Cir. 1987). The plaintiff must show that the two companies are "highly integrated with respect to ownership and operations" to overcome this strong presumption. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987) (quoting *Fike v. Gold Kist, Inc.*, 514 F.Supp. 722, 726 (N.D. Ala. 1981)).

The Fifth Circuit has refined the four factors by focusing on the second factor: centralized control of labor relations. Centralized control of labor relations refers to actual and active control of day-to-day labor practices. *Fike*, 514 F.Supp. at 727. In particular, a court must ask "What entity made the final decisions regarding employment matters related to the person claiming discrimination?" *Trevino*, 701 F.2d at 404. A review of the summary judgment facts is necessary to resolve the issue.

On this subject, Karagounis proffered evidence that UTHSCSA and BCHD entered into a written contract known as an Affiliation Agreement. According to Karagounis, the Affiliation Agreement shows the interplay between the two entities in the selection and appointment of members of the medical staff. The agreement also provides for a joint-management advisory committee and provides BCHD the right to approve and/or remove department chairpersons. Karagounis also contends that the agreement shows that both entities had a common annual budget.

Defendants, on the other hand, argue that BCHD and UTHSCSA are separate governmental

entities. According to BCHD, no employee of BCHD had anything to do with decision to terminate Karagounis nor did it control any aspect of his performance. BCHD describes its decision to terminate Karagounis as "an administrative termination," because Karagounis was no longer licensed to engage in patient care as a House Staff Physician. (Docket no. 22, page 3). UTHSCSA argues that the integrated-enterprise doctrine does not apply to this case because the doctrine only applies to situations where a plaintiff charges employment discrimination against an entity that is only peripherally associated with his employer. UTHSCSA also argues that the doctrine only applies to a parent-subsidiary relationship between corporations. Alternatively, UTHSCSA argues that if the doctrine applies, UTHSCSA and BCHD are not a single-integrated enterprise because UTHSCSA is a state medical school and BCHD is a county hospital. According to UTHSCSA the two entities have wholly different functions and purposes, and they do not share management.

At the onset, the Court must decide whether the single-integrated enterprise theory can be applied to the two defendants. The Fifth Circuit has previously applied the single-integrated enterprise doctrine to two companies that were entirely separate. *Trevino,* 701 F.2d at 404. The *Trevino* opinion does not indicate that the two entities were a parent and subsidiary. In *Trevino,* one company supplied the other company with maintenance and operating employees. *Id.* at 399. This parallels the instant case because UTHSCSA essentially supplied

BCHD with employees. Thus, the doctrine may be applied to hold an two distinct entities liable if the four-pat test identified in *Trevino* is satisfied.

Turning to the four-part test, the court must analyze the degree of interrelatedness between the two entities. The Affiliation Agreement specifies that the relationship between the two entities is that of independent contractor. (Docket no. 30, attachment 1, page 3). However, the terms of the Affiliation Agreement provide sufficient evidence of interrelation of operations, centralized control of labor relations and common management to warrant a finding of a single, integrated enterprise. *See Johnson v. El Paso Pathology Group, P.A.,* 868 F. Supp. 852, 860 (W.D. Texas 1994) (holding hospital system and professional association of doctors were sole employer because of contractual provisions providing for joint management).

With regard to centralized control of labor relations, the Affiliation Agreement provides that UTHSCSA agrees to furnish BCHD with medical-dental staff to supervise the training of students and house staff and to provide overall direction for all professional medical and dental services rendered to patients at the hospital. (Docket no. 30, attachment 1, page 3). Under the agreement, BCHD delegated to UTHSCSA the responsibility for "professional supervision and education of the House Staff...". (*Id.* page 3). Thus, according to the agreement, when UTHSCSA faculty supervised Karagounis, it was because BCHD had delegated that duty to UTHSCSA. This evidence demonstrates

that UTHSCSA controlled many labor decisions for BCHD.

Turning to common management, the agreement also provides for a joint-management advisory committee which is composed of four UTHSCSA representatives including the Dean of UTHSCSA and an equal number of BCHD representatives. (Docket no. 30, attachment 1, page 6). Karagounis also points out that Dr. Jay Bradley Aust, M.D., served as the Department Chairman of the General Surgery department in both UTHSCSA and University Hospital. (Docket no. 28, Karagounis affidavit ¶ 4). Likewise, Dr. Kenneth Sirinek, the Director of the General Surgery program, held appointments to the faculty of the UTHSCSA and was a member of the medical staff of University Hospital. (*Id.* ¶ 5). These facts show joint-management existed between the two entities. Significantly, both of these physicians were directly involved in the termination of Karagounis.

In the area of financial control, there is also evidence that the UTHSCSA is involved in financial control of BCHD. The Affiliation Agreement provides that BCHD and UTHSCSA shall enter into an annual operating agreement that is to be reviewed and concluded as part of BCHD's budgetary approval process. (Docket no. 30, attachment 1, page 8). The annual operating agreement included a review of the "cost of shared facilities, equipment, services and research projects and the allocation of these costs" between the two entities. (*Id* .). This provides evidence that at least as far as the residency program is concerned, the

tow entities shared financial control of BCHD's budgetary process.

Turning to the most important question of who made the decision to fire Karagounis, it is apparent that UTHSCSA made the decision. Georger Hernandez, the Vice-President of Legal Services for BCHD, stated that the selection and retention of Dr. Karagounis for participation in the residency program was made solely by employees of UTHSCSA. (Docket no. 30, attachment 2, page 3). Hernadez further testified that no one at BCHD selected, evaluated, graded, recommended personnel actions regarding, or discharged Karagounis. (*Id.* at page 4). Jack Park, Executive Director for Legal Affairs and Technology Licensing at UTHSCSA, also testified that Karagounis' selection and termination was made solely by faculty members employed at the UTHSCSA. (Docket no. 30, attachment 3, pages 3-4). This evidence shows that UTHSCSA controlled employment decisions for BCHD. As noted above Drs. Aust and Sirinek were directly involved in the decision to terminate Karagounis and both physicians held positions with both UTHSCSA and BCHD. In summary, Karagounis has produced sufficient evidence to show that a genuine issue of fact exists regarding the status of UTHSCSA and BCHD as a single-integrated enterprise for Title VII purposes.[3] Since the Court finds there is

[3] The Court questions whether this issue is one of law or of fact. The parties have treated it as an issue of fact. In *Trevino,* the Court of Appeals also treated this issue as one of fact. 701 F.2d at 404-405. Therefore, so shall this Court.

sufficient evidence to establish an employment relationship between Karagounis and BCHD, a review of the merits of the case is in order.

PRIMA FACIE CASE OF DISCRIMINATION

BCHD alleges that Karagounis cannot succeed on his discrimination claim because no agent or employee of BCHD discriminated against Karagounis. BCHD argues that UTHSCSA faculty members made the decision to terminate Karagounis and that BCHD merely "ministerially ceased his stipend" when notified by UTHSCSA that Karagounis was no longer a participant in good standing in the residency program.

The well-established framework of proof in an employment discrimination case requires that the plaintiff carry the initial burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. *Patterson v. McLean Credit Union,* 491 U.S. 164, 186, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). If the plaintiff does so, a rebuttable presumption arises that the employer unlawfully discriminated. *Patterson,* 491 U.S. at 187, 109 S.Ct. at 2378; *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. The burden shifts to the defendant to present evidence that the plaintiff was treated in a certain way for a legitimate, nondiscriminatory reason. *Id.* If this burden is met, the presumption disappears

and the plaintiff has the opportunity to prove that the reason articulated by the employer was a mere pretext for discrimination. *Patteson,* 491 U.S. at 187, 109 S.Ct. at 2378; *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095. It is not enough to show that the stated reason is false; plaintiff must show both that the stated reason is false; plaintiff must show both that the stated reason was false and that discrimination was the actual reason for the adverse employment action. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993). The plaintiff retains the burden of persuading the fact-finder of intentional discrimination. *Id.*

In the usual employment discrimination case, a complainant must establish a *prima facie* case by showing: (1) he was terminated; (2) he was qualified for the position; (3) he was a member of the protected class. *St. Mary's,* 509 U.S. at 506, 113 S.Ct. at 2747. To establish a claim of disparate treatment on the basis of national origin or gender, Karagounis must establish that a similarly-place non-Grecian or female employee received dissimilar treatment. *Rohde v. K.O. Steel Castings, Inc.,* 649 F.2d 317, 322 (5th Cir. 1981). This may be established by showing that BCHD discharged a Grecian or male employee, but retained a non-Grecian or female employee under apparently similar circumstances. *Turner v. Texas Instruments,* 555 F.2d 1252, 1255 (5th Cir. 1977).

As evidence of the *prima facie* case, Karagounis alleges that the was qualified for the position. He then argues that another resident,

Sarah Willard, was similarly situated to him, but was promoted to Chief Resident rather than discharged. According to Karagounis, Willard, a non-Grecian female resident, failed the same written and oral examinations that the previously failed. Karagounis alleges that Willard was promoted from a third-year resident to a fifth-year Chief Resident despite her poor performance on the exams. Karagounis also alleges that some unidentified individual made the comment that Karagounis should return to Greece to practice medicine. Karagounis argues that the comment shows a belief that a foreign-born person should not practice in the United States. In support of his allegations, Karagounis attached to this response several performance evaluations and what appears to be a transcript of meetings between Karagounis and UTHSCSA faculty. (Docket no. 35, exhibits 1 & 2). The transcript contains several editorial comments that appear to have been added by Karagounis. Since BCHD did not object to this summary judgment proof, the Court will consider it as evidence for the purposes of ruling on this motion.

With regard to whether Karagounis was qualified for the position, he has submitted evaluations of his performance completed by UTHSCSA faculty during his residency. While the evaluations vary, two of them by separate physicians (one of whom was Dr. Sirinek), four months prior to notification of termination, demonstrate that Karagounis performed at a level "comparable to fellow residents at the same level of

training at [UTHSCSA]'s current program." (Docket no. 35, exhibit 1, surgery A evaluation 3/1/94 to 4/30/94, bates nos. 000070 and 000071). One of the evaluations states that Karagounis had "improved greatly" over the past year. This is sufficient evidence of his qualifications for purposes of a *prima facie* case.

Next the Court must determine whether there is evidence to show that Karagounis was in a similar situation to Willard, the female resident, but treated differently. In UTHSCSA's answers to requests for production of documents, it states that Karagounis was the only doctor dismissed from the residency program from December 31, 1990 to present. (Docket no. 35, exhibit 1, response no. 12). In the transcript of Karagounis' meetings with Sirinek, Sirinek makes a statement that Willard and Karagounis are in a similar situation with regard to their oral exams. (*Id,* page 10). The transcript also indicates that Willard graduated the residency program on June 30, 1995.

Karagounis thus argues that he was similarly situated to Willard, but she was allowed to graduate and he was not. Although the evidence is sketchy, there is sufficient evidence to show that at least one residency student who was non-Grecian and female was allowed to graduate the program despite the fact that she failed the written and oral exams. In its summary judgment motion, UTHSCSA points out that Willard was placed on probation, which she successfully completed prior to promotion. The summary judgment record does not reflect that Karagounis was given the same opportunity.

Because BCHD and UTHSCSA are one employer for purposes of Karagounis' Title VII claim, the decision of UTHSCSA to terminate Karagounis from the residency program is attributable to BCHD. Thus, Karagounis has established a *prima facie* case of discrimination.

Once a *prima facie* case of discrimination is established, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the discharge. BCHD contends that it dismissed Karagounis because he was no longer licensed to engage in patient care as a House Staff physician. (Docket no. 22, exhibit A, page 5). This qualifies as a legitimate non-discriminatory reason for this termination. Next, Karagounis bears the burden of coming forward with evidence that the reason is false and that the real reason was a discriminatory one. As discussed above, Karagounis has come forward with at least some evidence that he was qualified for the position which is evidence that BCHD's reason for terminating him was false. Karagounis also alleges that someone made the comment that he should go back to Greece to practice medicine. Karagounis has also shown that he was treated differently than Willard even though they both failed the same exams. This is at least some evidence of discrimination which Karagounis should have an opportunity to develop at trial. Therefore, the motions for summary judgment should be denied.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that defendants' motions for summary judgment (docket nos. 22 and 30) be **DENIED.**

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28 U.S.C. Section 636(b) (1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *See Thomas v. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings,

conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Services Automobile Association,* 79 F.3d 1415, 1428 (5th Cir. 1996).

SIGNED this 18th day of July, 1996

"s/ JOHN W. PRIMONO"
UNITED STATES MAGISTRATE JUDGE

APPENDIX D ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING KARAGOUNIS' PETITION FOR REHEARING FILED MARCH 23, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50587

VASILIOS A. KARAGOUNIS, M.D., Ph.D.,
Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO; UNIVERSITY
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion_____,5Cir.,_____,_____F.3d___
____)

Before KING, Chief Judge, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:

(°) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R> 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

"s/ STEWART
United States Circuit Judge